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No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statutory provision that allows a claimant to petition the Customs Service for discretionary remission or mitigation of penalties for violations of the customs laws creates a property interest subject to the requirements of the Due Process Clause of the Fifth Amendment.

2. Whether, assuming that due process requirements apply to the remission decision, they impose some obligation of prompt disposition that could be violated by the mere passage of 36 days from the filing of a petition to its disposition.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 729 F.2d 657. The previous opinion of the court of appeals (App., *infra*, 15a-32a) is reported at 660 F.2d 1319.[1] The findings of fact

[1] That opinion as reported does not contain the modifications that the court of appeals made to its decision in denying the government's petition for rehearing. See App., *infra*, 33a-34a.

and conclusions of law of the district court (App., *infra*, 35a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1984. A petition for rehearing was denied on September 18, 1984 (App., *infra*, 13a-14a). On December 6, 1984, Justice Rehnquist granted an extension for filing a petition for a writ of certiorari to January 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

19 U.S.C. 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to a forfeiture and such person shall be liable to a penalty equal to the value of such article.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the

> Treasury if under the customs laws * * * or under the navigation laws, * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, * * * if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just * * *.

STATEMENT

In March or April 1974, respondent, an automobile dealer, purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada, with the intention of bringing it into the United States (Tr. 13, 20-21). For this purpose, respondent had the automobile registered in the State of California and obtained California license plates for it (App., *infra*, 36a). On January 20, 1975, respondent arrived in Vancouver to take possession of the vehicle and obtained from Canadian Customs a release form authorizing him to transport it through Canada to the United States-Canadian border in British Columbia. Canadian Customs officers instructed him to deliver the form to the Canadian Customs border station before leaving Canada. Tr. 27-30, 151; App., *infra*, 16a-17a, 36a.

Later that day, respondent drove south toward the United States border. After failing to stop first at the Canadian Customs station to surrender the release form as he had been instructed, he arrived at the United States border checkpoint at Blaine, Washing-

ton, at approximately 5:00 p.m. Tr. 31-32; App., *infra*, 17a, 36a-37a.[2]

Earlier that day Canadian Customs officials had alerted United States customs officers at the Blaine checkpoint that a Jaguar Panther automobile had been off-loaded at the Vancouver ocean terminal and might be driven across the border into the United States (Tr. 110-111). As respondent drove up to the Customs primary inspection point, the inspector on duty recognized that the automobile matched the description given by the Canadians. After the inspector inquired whether respondent was a United States citizen and how long he had been outside the United States, he asked whether respondent had purchased or acquired anything outside the United States (Tr. 113). When respondent answered negatively, the inspector asked him whether he had anything to declare to Customs, "to make sure there was no mistake about what information was needed" (Tr. 114). Respondent indicated that the only property in his possession was his personal belongings (*ibid.*). App., *infra*, 17a, 37a.[3]

Following this exchange, the inspector directed respondent to park his car and to enter the Customs station. He then referred the case to his supervisor,

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[2] Respondent testified that he inadvertently had passed the Canadian Customs building because of poor visibility and inadequate directions (Tr. 31-32; App., *infra*, 17a).

[3] During the hearing, respondent conceded that he knew he had to declare his automobile at the United States Customs station, but he claimed that he planned to do that only after he stopped at the Canadian Customs station. He testified that he understood the Customs inspector's question to relate exclusively to purchases or acquisitions made in Canada and that the inquiry thus did not refer to his automobile, since it had been purchased in Switzerland. Tr. 38-40.

giving as the reason for additional inquiry respondent's failure to declare the vehicle. Tr. 115-116. When the supervisory inspector asked respondent why he had failed to declare his automobile, respondent answered that he did not think he was required to. The officer then informed him that the vehicle was being seized because of his failure to declare it. Tr. 144-145, 148-149; App., *infra*, 17a-18a. See 19 U.S.C. 1497, 1602.

The supervisor then completed the necessary seizure documents and assisted respondent in preparing a "Petition for Remission or Mitigation of Forfeitures and Penalties Incurred." In his very brief, handwritten petition, respondent stated that he "had no intention of avoiding U.S. Customs duties" and explained that he had mistakenly arrived at the United States Customs office after attempting to locate Canadian Customs for the purpose of surrendering his Canadian release form. C.A. App. 10; App., *infra*, 18a.[4] Upon completion of the necessary documents, the supervisor explained that respondent could obtain the release of his vehicle by posting its value[5] and arranged for respondent to be transportated to a local hotel (Tr. 51, 155-159).

2. Two weeks later, on February 3, 1975, respondent posted a bond for $24,500, the appraised value of his car, and Customs returned the vehicle to him

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[4] "C.A. App." refers to the excerpt of record filed with the court of appeals.

[5] Customs officials have discretion to release a seized vehicle to a person claiming a "substantial interest therein" upon payment of the value of the vehicle. 19 U.S.C. 1614. The payment serves as a bond to cover any penalty assessed for failure to make the declaration required by law. See 19 C.F.R. 162.43, 162.44(b).

(App., *infra*, 19a). On February 12, 1975, respondent filed with Customs a "Supplement to the Petition for Remission" in which he provided a detailed account of the circumstances surrounding his attempt to bring the automobile into this country. Respondent alleged for the first time that the customs inspector had never inquired whether respondent had anything to declare; he also repeated his earlier claim that he fully intended to pay the duty on the automobile (C.A. App. 11-14). Petitioner did not, however, request that his petition be acted upon with expedition.

On February 25, 1975, the Seattle District Director of the Customs Service[6] informed respondent that, upon consideration of his petition and the reported facts, the penalty for failing to declare the car was being remitted to $3,600. The District Director therefore refunded $20,900 to respondent (C.A. App. 15). Respondent obtained an administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment (C.A. App. 17). App., *infra*, 19a.

2. Respondent then filed the instant suit in the United States District Court for the Central District of California, seeking, inter alia, return of the $3,600 penalty and a declaration that the seizure of his automobile and the imposition of a penalty were unlawful

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[6] By statute, the Secretary of the Treasury is authorized to act on petitions for remission or mitigation. 19 U.S.C. 1618. This authority has been delegated to District Directors of the Customs Service in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. 171.21. The estimated value of respondent's car, $24,500, thus fell within the District Director's authority to act on petitions for remission or mitigation.

(C.A. App. 2-9).[7] After an evidentiary hearing, the district court found that respondent had violated 19 U.S.C. 1497 by failing to declare his automobile and that, accordingly, the seizure of the vehicle by Customs was proper and the automobile was subject to forfeiture (App., *infra*, 39a). The district court also found that the remission and mitigation procedures followed by Customs "were proper" (*ibid.*).

3. The court of appeals affirmed the district court's determination that the seizure of respondent's vehicle was proper, finding that "[t]he record fully supports the district court's conclusion that [respondent] attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so." App., *infra*, 20a. It reversed, however, the district court's holding that the procedures followed by Customs in acting upon respondent's petition for mitigation were proper. Proceeding from the premise that in cases involving the seizure of an automobile "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618" (App., *infra*, 30a), it held that "[t]he [one month] delay in processing [respondent's] petition for remission or mitigation * * * violated his due process right to prompt con-

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[7] The government filed a contingent counterclaim seeking recovery of the full $24,500 in accordance with 19 U.S.C. 1497, in the event the district court found the administrative mitigation proceedings invalid. The counterclaim was based upon the theory that, if the administrative settlement were found to be invalid, the government was free to seek forfeiture of the full value of the vehicle as a penalty for failing to declare it, just as if no administrative relief had ever been granted (C.A. App. 22-23, 32). The district court, having entered a judgment in favor of the government, accordingly denied the contingent counterclaim (App., *infra*, 39a).

sideration of his claim" (*id.* at 32a).[8] The court then went on to articulate specific standards to be used by Customs prospectively to assure the prompt processing of petitions for administrative relief. The court stated that Customs should, unless "unusual circumstances" require a brief delay, act on all petitions within 24 hours of receipt and provide the claimant an opportunity to make an oral appearance to argue his claim (*id.* at 31a-32a & n.16, 33a-34a).

4. The government sought certiorari, and this Court granted the petition and vacated and remanded for reconsideration in light of *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983). 462 U.S. 1101 (1983). On remand, the court of appeals adhered in substantial part to its previous decision (App., *infra*, 1a-12a). The court found that this Court's decision in *$8,850* "reinforce[d]" its view that due process rights attach to the processing of the petition for remission, and therefore the court reaffirmed its earlier holding that due process requires Customs to dispose of those petitions promptly (*id.* at 7a).

With respect to the standards it had established for considering petitions for remission or mitigation, the

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[8] The court of appeals relied heavily upon the decision of the Second Circuit in *Lee* v. *Thornton*, 538 F.2d 27 (1976), in concluding that due process requires prompt disposition by Customs of administrative petitions for remission or mitigation of vehicle forfeitures. In *Lee*, the court, relying upon the balancing analysis in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), held that when vehicles are seized for forfeiture, action on petitions for remission or mitigation should be required within 24 hours, unless a hearing on probable cause is requested by the claimant, in which event the hearing should be conducted within 72 hours of the seizure. 538 F.2d at 33.

court of appeals drew back from the 24-hour limit that it had imposed, noting that *$8,850* had indicated that a due process inquiry should be a flexible one that depends on the facts of a particular case (App., *infra*, 8a). Relying on *$8,850*, the court adopted the four-factor analysis of *Barker* v. *Wingo*, 407 U.S. 514 (1972), as the appropriate framework for considering a claim of violation of due process through delay in processing a petition for remission or mitigation (App., *infra*, 8a-9a & n.6).

The court of appeals remanded the case to the district court to consider those factors, but it deemed it appropriate to make several observations to assist the district court. Stating that "the propriety of the delay may turn to a great extent upon the nature of the item that has been seized," the court of appeals noted the "special hardships" imposed on persons deprived of their automobiles, which are "particularly grave when the seizure, as here, leaves a traveler without transportation at a remote border point" (App., *infra*, 10a). Although the reasons for the delay were not previously at issue in the district court, the court of appeals also stated that the record indicated "no obvious reason" for the one-month delay and that it "appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition" (*id.* at 11a). With respect to the third *Barker* factor, the court noted that respondent had promptly filed a petition for remission, "which seems a sufficient assertion of his rights" (*ibid.*). Finally, the court noted that the prejudice to the claimant from the delay could include "expenses resulting from a seizure of his vehicle, sudden disruption of travel plans [and] inconvenience" (*id.* at 12a).

REASONS FOR GRANTING THE PETITION

This case presents questions of both practical and theoretical importance concerning the Due Process Clause of the Fifth Amendment. The decision below finds a due process right in a purely discretionary remedy that, as a matter of administrative grace, may relieve an individual who violates the Customs laws from the civil penalty imposed by law for his conduct. Moreover, the due process restraints imposed by the decision below are substantial ones. In a real sense, the court of appeals here has turned normal due process concepts on their head by apparently requiring disposition of remission petitions with such speed that the agency's ability to make fair, accurate, and reasoned decisions will be sustantially impaired. In addition, the holding below flies in the face of this Court's recent decision in *$8,850* by finding that a 36-day delay in ruling on a petition for remission will ordinarily violate due process, even though *$8,850* held that an 18-month delay in holding judicial forfeiture proceedings (conceded by the court of appeals to call for stronger due process protection than this case) did not violate due process. Because the decision of the Ninth Circuit is squarely at odds with numerous decisions of this Court and because it creates significant administrative problems for Customs and potentially injures the interests of all persons whose property is seized for forfeiture in the Ninth Circuit, review by this Court is in order.

1. It is well established that the procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group:

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision-making must comply with standards that assure error-free determinations.

Greenholtz v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979), citing *Meachum* v. *Fano*, 427 U.S. 215, 224-225 (1976). By its terms, the Clause applies only in those circumstances in which governmental action threatens to deprive a person of "liberty" or "property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972).

The decisions of this Court make it clear that the government creates a property or liberty interest cognizable under the Fifth Amendment only when it binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts. See, *e.g.*, *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 462-467 (1981); *Greenholtz*, 442 U.S. at 10; *Meachum* v. *Fano*, 427 U.S. at 226; *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976). Applying this analysis in *Dumschat*, 452 U.S. at 465, this Court held that a prisoner serving a life sentence had no due process liberty interest at stake in the decision whether to commute his sentence, because "[t]he [commutation] petition * * * is nothing more than an appeal for clemency. * * * In terms of the Due Process Clause, a * * * felon's expectation that a lawfully imposed sentence will be commuted or that he will be pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope." (footnote omitted). See also *Olim* v. *Wakine-*

kona, 461 U.S. 238 (1983); *Jago* v. *Van Curen*, 454 U.S. 14, 20-21 (1981).

It is plain that the relief of remission or mitigation is similarly a matter of executive grace that is not designed to create any "property" interest protected by the Due Process Clause. Over 150 years ago, in *United States* v. *Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825), this Court described the Customs remission process, enacted by the First Congress, Act of May 26, 1790, ch. 12, 1 Stat. 122 *et seq.*, as a "subject submitted to [the Secretary of the Treasury's] sound discretion." Indeed, the Court's description of the remission process is very much like that of a pardon: "It presupposes, that the offence has been committed, * * * and affords relief for inadvertencies, and unintentional error." 23 U.S. (10 Wheat.) at 291.

The understanding that an administrative application for remission or mitigation invokes a wholly discretionary power and creates no entitlement in the claimant is clearly expressed in the current statute, 19 U.S.C. 1618, enacted in its present form as part of the Tariff Act of 1930. Section 1618 provides that "the Secretary of the Treasury, * * * if he finds that such * * * forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such * * * forfeiture, *may* remit or mitigate the same *upon such terms and conditions as he deems reasonable and just* * * *" (emphasis added). This statute, like the sentence commutation statute considered in *Dumschat*, grants the claimant no more than the ability to petition for clemency. The decision whether to grant remission or mitigation and the proper terms

of such relief are left to the discretion of the Secretary or his designee.[9] In a manner similar to that of a state parole board, he is empowered, but not required, to remit or mitigate forfeitures upon such terms as he deems "reasonable and just" when he finds that mitigating circumstances warrant such relief. See *Greenholtz*, 442 U.S. at 7. There is thus no particular set of facts that, if shown, mandate a decision favorable to the claimant. In the absence of specific factual criteria defining entitlement to relief, remission or mitigation must be considered an act of grace to which due process protections—including any right of prompt disposition of claims respecting property interests—do not attach.[10]

2. Assuming, contrary to our previous submission, that the Due Process Clause attaches to determina-

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[9] It is well settled that the decision whether to grant petitions for remission is a wholly discretionary decision of the Executive Branch; courts lack jurisdiction to review the Secretary's action on a petition for remission or mitigation. See *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977); *United States* v. *One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976); *United States* v. *One 1970 Buick Riviera*, 463 F.2d 1168 (5th Cir.), cert. denied, 409 U.S. 980 (1972); *United States* v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964).

[10] This conclusion does not, of course, mean that an individual has no right to due process in connection with the disposition of his seized property. He is entitled to a hearing on the forfeitability of the property, and, under *$8,850*, he has due process protection against unreasonable delay in the forfeiture proceeding. If delay in processing a petition for remission or mitigation becomes inconvenient for the claimant, he may, of course, withdraw his petition and seek prompt judicial forfeiture proceedings. In any event, he retains the right to raise a due process objection to the delay in the forfeiture proceeding itself.

tions concerning petitions for remission or mitigation and that it imposes some time limits on the making of such determinations, the limitations imposed by the court of appeals' decision are far more stringent than anything that conceivably could be required by the Constitution. The result of the court's holding is that, unless a petition is decided almost immediately, every case will give rise to a triable issue of a due process violation; moreover, the court strongly suggests that, in the absence of unusual extenuating circumstances, a 36-day consideration period violates due process. This is, we respectfully submit, a wholly unreasonable result produced by an analysis seriously flawed in several respects.

a. Initially, a conclusion that some process is due in connection with the consideration of a remission petition merely poses, but does not answer, the question whether the required process encompasses a right to a speedy disposition of the petition. Due process is a "flexible" concept that "calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Basically, due process guarantees that a proceeding be fair; "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). The Customs Service has established detailed procedures for the equitable processing of remission petitions (see note 18, *infra*), and respondent has not complained that he was given an inadequate opportunity to present his case here.

There is in fact no need to create a constitutional right to a speedy disposition in order to insure funda-

mental fairness in the remission context. True, the Court did recognize a due process right to a speedy judicial forfeiture proceeding in *$8,850* because the claimant is deprived of the use of the property—to which he may have a valid claim—until the forfeitability of the property is resolved. See 461 U.S. at 563-564. The administrative remission context, however, is fundamentally different from *$8,850* in this regard. The underlying premise of a remission petition is that the property is forfeitable; the claimant merely seeks to have the penalty eliminated or reduced because of mitigating factors.[11] When property is forfeitable, it becomes the government's property as of the time it is seized. See *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890); *Ivers* v. *United States*, 581 F.2d 1362, 1367 (9th Cir. 1978). Plainly, the claimant should have no constitutional right to speedy disposition of his petition when he is not being deprived of the use of his property during the pendency of the petition (because the property in question is recognized—for purposes of the administrative petition proceeding—as belonging to the government).

b. In any event, even if there were a constitutional right to speedy disposition of a remission petition and the court of appeals were correct that the claim should be analyzed under the *Barker* v. *Wingo* factors,[12] the court's application of those factors is not

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[11] If the claimant wishes to contest forfeitability, the judicial forum is the place to do so; there, the right to a reasonably prompt determination is protected.

[12] It is by no means clear that a due process claim for delay in acting on a remission petition ought to be resolved by reference to the *Barker* factors, at least in the absence of a threshold showing of prejudice caused by the delay. In the somewhat analogous area of preindictment delay, this Court

faithful to the analysis described in *$8,850* and *Barker*. First, it is clear that the time taken here to act on the petition was far too brief to give rise to any due process claim. The length of the delay under *Barker* is a factor that "triggers" consideration of the other factors. See 407 U.S. at 530. It is clear that, even in the speedy trial context, where the constitutional protection ought to be significantly stronger than here (see *$8,850*, 461 U.S. at 565 n.14), 36 days is considerably too short a period to be "presumptively prejudicial" (*Barker*, 407 U.S. at 530) and therefore trigger consideration of the other *Barker* factors for a possible speedy trial violation. See, *e.g.*, *United States* v. *Struyf*, 701 F.2d 875, 879 (11th Cir. 1983)

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has stated that "proof of prejudice is generally a necessary but not sufficient element of a due process claim." *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). This Court did suggest in *$8,850* that a due process claim based on delay might be possible in some circumstances in the absence of demonstrable prejudice, but, as the court of appeals itself recognized (App., *infra*, 6a-7a), the claim here is significantly different from that in *$8,850*. In *$8,850*, the claim concerned the delay in holding a judicial forfeiture proceeding, which is the final step in the legal path triggered by the seizure of forfeitable property. It therefore was logical for the Court in *$8,850* to look for guidance to cases arising under the Speedy Trial Clause, an analogous situation involving the delay in holding the final step (the trial) in the chain of judicial events triggered by an indictment. But the claim here is not analogous to a speedy trial claim; a petition for remission or mitigation is an optional, and collateral, administrative remedy that plainly is not automatically set in motion by the seizure of forfeitable property. Hence, despite *$8,850*, some showing of prejudice caused by the delay ought to be a prerequisite to a due process claim of delay in acting on a petition for mitigation, just as *Lovasco* holds that it is for preindictment delay.

(seven month delay does not trigger consideration of other *Barker* factors); *United States* v. *Nance*, 666 F.2d 353, 360 (9th Cir.), cert. denied, 456 U.S. 918 (1982) (five months); *United States* v. *Elorduy*, 612 F.2d 986, 988 (5th Cir. 1980) (six months). See also *United States* v. *MacDonald*, 456 U.S. 1, 11 (1982).

Second, the focus of the court of appeals' *Barker* analysis is completely misdirected. The court looked to the prejudice resulting from the *seizure* itself, such as the potential consequences of depriving an individual of a means of transportation for an extended period of time (see App., *infra*, 12a); but the alleged due process violation arises not from the seizure, but from a delay in processing a petition for remission. The class of cases under consideration involves vehicles as to which there is probable cause to believe that they have themselves been smuggled into the country (as here) or have been employed for the transportation of illegal drugs or other contraband. Generally, the claimant has no basis for objecting to the seizure itself.[13] The purpose of the remission process is to consider whether there are extenuating circumstances that might justify amelioration of the penalty of forfeiture. As we indicate in the discussion in point 3, this determination will often take considerable time. A person who attempts to smuggle a vehicle or contraband across the border should be held to have assumed the risk of any inconvenience that might result from its seizure. Accordingly, the hardship involved in loss of the vehicle for a period of several weeks, or even months, while a remission petition is under consideration is simply not the kind

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[13] If the lawfulness of the seizure is being disputed, the forum provided for that inquiry is a motion for return of property under Fed. R. Crim. P. 41(e).

of prejudice that activates a due process requirement of speedy disposition.[14]

Moreover, procedures exist to permit the claimant to obtain the return of his vehicle; he can post a bond in the amount of the value of the vehicle. That is what respondent did in this case, two weeks after the seizure, at which time the Jaguar was released to him. Indeed, there is nothing in the record to show why he could not have posted a bond and obtained possession of the car within a day or two had he wished to do so.[15] Moreover, it can hardly be said in this case that respondent was left stranded at the border (see App., *infra*, 10a). Rather, the Customs agent arranged for transportation for respondent to the nearest town, from which respondent arranged to fly home in his private plane that was waiting in Seattle (Tr. 51-52). In short, the inconvenience suf-

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[14] The error of the court of appeals' decision may perhaps most clearly be demonstrated by considering what the analogous rule would be as applied to seizure of the person—an event surely as inconvenient to the individual as the seizure of his automobile. Under such a rule, an individual who had been arrested on probable cause to believe he had committed a crime and who asked the prosecutor to consider a plea bargain or dismissal of all charges could not be prosecuted at all if the prosecutor failed to give a final response to such a proposal within the short time frame suggested by the decision below. No one would seriously propose such a rule in the case of arrests, and we are at a loss to understand why it should apply to seizures of property.

[15] Respondent stated to the Customs officer at the time of the seizure that it would be "no problem" for him to obtain the funds to secure release of the car (Tr. 157, 159). Moreover, respondent testified that he was familiar with Customs "informal entry" procedures that would have required him to post a bond in the amount of the value of the car in order to be allowed to go on his way (Tr. 67).

fered by respondent when his effort to escape paying duty on a $24,500 foreign automobile was thwarted was fairly ascribable to his own misdeed and not to any unfairness in the processing of his petition for administrative clemency.

Examined in the proper light, *i.e.*, focusing on the delay in processing the petition, the *Barker* v. *Wingo* factors cannot possibly be found to support a due process claim in this case. As noted earlier, the length of the delay was entirely too short to suggest any constitutional deficiency. The short delay was almost certainly ascribable to the need to investigate the contentions raised by and assess the merit of respondent's petition for remission. With respect to the third *Barker* factor, while the filing of the petition for remission at the time of seizure may have indicated respondent's intent to avoid, if possible, forfeiture of the total value of the car, it can hardly be construed as an assertion of his "right" to consideration of his petition in less than 36 days.[16] Indeed, respondent's filing of a detailed supplemental petition, less than two weeks before his petition was finally acted upon, plainly belies such an intent. Finally, there is no suggestion how the delay in acting on the petition (as distinct from the seizure itself (see App., *infra*, 12a)) could possibly have prejudiced the claimant in the manner contemplated in *$8,850*—in his defense against the forfeiture action (see 461 U.S. at 569-570)—or, indeed, in any other way. In short, the court of appeals' remand order, with its sugges-

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[16] Since the due process claim involved here can arise only if a petition for remission or mitigation is filed, the court of appeals' analysis completely eliminates this *Barker* factor from the equation by weighing it in favor of the claimant in every case.

tion that the district court could find a due process violation because of the 36-day consideration period in this case, is gravely flawed.[17]

3. The decision of the court of appeals also ordains a wholly irrational system for processing remission petitions that will have deleterious practical effects well beyond the small sum of money at stake in this case. By treating routine delay in processing a remission petition as a due process violation barring imposition of any penalty for smuggling, the decision, if allowed to stand, will inject undue haste into the administrative process that will harm not only the agency but also the interests of claimants generally. In order to give adequate and reasoned consideration to a claimant's petition, Customs must often investigate the basis for the factual allegations in the petition and make other inquiries, which may concern events and circumstances beyond those at the site of the seizure or submission of the petition. As detailed in an affidavit executed by the Director of the Entry Procedures and Penalties Division, Office of Regulations and Rulings, United States Customs Service,

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[17] Indeed, it might fairly be said that the court of appeals has distilled *Barker* into a single factor test for delays in acting on remission petitions. Since, under the court of appeals' analysis, even a very short delay triggers the inquiry, the mere filing of the petition satisfies the demand requirement, and inconvenience caused by the seizure is treated as prejudice caused by the delay, it would appear that three of the *Barker* factors will be weighed in favor of the claimant in almost every case of this kind. The due process question will turn entirely on the reasons for the delay. If Customs can show that, under the circumstances, it could not possibly have acted on the petition more quickly, the due process claim will be denied. Otherwise, the claim will be granted and the forfeiture invalidated.

which was filed with the government's rehearing petition (App., *infra*, 41a-50a), most decisions on petitions for remission normally take more than 30 days and, in a large number of cases, at least three to six months is needed for Customs to collect the information necessary to make an informed decision even if it gives high priority to an application over other pending matters (App., *infra*, 45a, 47a, 49a).[18]

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[18] The Director's affidavit explains that there are numerous factors that are considered in deciding the extent to which relief should be granted: *e.g.*, whether the violation occurs in connection with a commercial shipment or an importation for personal use; whether the petitioner has a previous record of Customs or criminal violations; whether the violation was negligent or willful; and the validity of a claim that forfeiture would create an extraordinary financial hardship. App., *infra*, 46a-47a. Both time and manpower are required to conduct the necessary investigations.

Moreover, the agency has established formal procedures for processing petitions for remission of forfeiture, which help assure fair and equitable treatment of all petitions. These procedures, which are set forth in the United States Customs Service's *Fines, Penalties and Forfeitures Handbook* 116-119 (rev. 1979), contemplate a multi-step investigation and review process: (1) upon receipt of a petition, an "FP&F" officer examines the document to determine whether further investigation is needed; (2) if he determines that further investigation is required, he prepares a request for investigation and forwards it to the District Director; if additional investigation is not deemed necessary, he prepares a memorandum for the District Director recommending a final determination based upon guidelines and applicable precedent; (3) in cases where further investigation is deemed necessary, the District Director may refer the case to the Customs Office of Investigation, which will further investigate the allegations contained in the petition or obtain the information specified by the District Director; (4) following the investigation, the Customs investigator files a report with the District Director; (5) upon completion of the investigatory and review processes,

Indeed, the factors that necessitate more extended consideration of petitions than the court of appeals seems willing to accept are well illustrated by this case. See App., *infra*, 47a-48a. A responsible decision on respondent's petition required at a minimum an inquiry (that could potentially extend all the way to Switzerland) into respondent's ownership interest in the seized vehicle, because it was registered in the name of Grace Blote, its intended recipient (C.A. App. 11). In addition, the District Director was required to consider respondent's allegations that the Customs inspector at the Blaine, Washington, Customs station had never asked him whether he had anything to declare and that respondent lacked any intent to avoid paying his customs duty (C.A. App. 13). To evaluate these claims required at least some inquiry into respondent's background, which could not reasonably be based exclusively on respondent's self-serving statements about his reputation for veracity. If anything, Customs should be commended, not condemned, for reaching a decision on this petition in five weeks.

The court of appeals' decision that, except in unusual circumstances, 36 days is too long to consider a petition will require Customs to act in haste that will unavoidably result in a failure fully to explore and consider pertinent facts. Thus, the decision below ac-

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the District Director decides the action to be taken on the petition and advises the petitioner of the decision in a written opinion that includes a statement of the findings of fact and the reasoning on which the decision relies. For seizures valued at more than $25,000, there is an additional level of review; the final decision on the petition is made by Customs' Washington, D.C., headquarters or, if the seized items are valued at more than $100,000, by the Department of Treasury (App., *infra*, 48a-49a).

tually undermines one of the primary purposes of due process, viz., to reduce the risk of governmental error. See *Mathews* v. *Eldridge*, 424 U.S. at 335. The unrealistic time constraints will increase significantly the likelihood that the decisions on petitions will be arbitrary. Indeed, the most logical response to the decision below would be for Customs simply to deny petitions that it has not definitely decided to grant in the brief time available. In many cases, the matter would then be referred under 19 U.S.C. 1603 to the United States Attorney for the institution of judicial forfeiture proceedings.[19]

Accordingly, the decision below undermines the congressional purpose in establishing the remission and mitigation remedy, which is designed to favor an administrative, rather than judicial, resolution of claims resulting from Customs seizures. See, *e.g.*, H.R. Rep. 1429, 75th Cong., 1st Sess. 5 (1937); S. Rep. 1465, 75th Cong., 3d Sess. 11 (1938). Moreover, this result is contrary to the interests of most claimants. Usually, and this was certainly true in respondent's case, a claimant's only realistic hope of reacquiring any of his property is the remission process,

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[19] In 90% of all cases of seizure of non-contraband property, the claimant files a petition for remission or mitigation. See *$8,850*, 461 U.S. at 558. The Director's affidavit in this case states that in 95% of car seizure cases in which such petitions are filed, the case is settled administratively without the necessity of instituting forfeiture proceedings: *i.e.*, the vehicle is returned upon payment of a mitigated amount (App., *infra*, 49a). If the decision below induces Customs to act on all petitions within 30 days, even when that period is insufficient to make an informed decision, many of these cases (perhaps as many as 70% (*id.* at 49a, 50a)) that would otherwise be settled administratively will be referred for forfeiture proceedings.

and thus denial of the petition because of time constraints is rarely in his best interest. See *$8,850*, 461 U.S. at 566. Because the decision below would have a "disruptive effect" on Customs' forfeiture program (App., *infra*, 50a) and seriously disadvantage many persons affected by the program, it is important that the erroneous ruling of the court of appeals be overturned by this Court.[20]

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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JANUARY 1985

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[20] For these reasons, we urge the Court to grant certiorari even though the case has been remanded to the district court for further proceedings. Even if the United States prevails on remand, the decision of the court of appeals will remain the governing law in the Ninth Circuit, and the serious problems it creates will plague the administration of the forfeiture program until action is taken by this Court.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

On Remand from the United States Supreme Court

March 30, 1984

Before TANG and BOOCHEVER, Circuit Judges, and PRICE.* District Judge.

BOOCHEVER, Circuit Judge.

This case was remanded by the United States Supreme Court for further consideration in light of *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency,*

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

—— U.S. ——, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983) (hereinafter referred to as *$8,850*). The issue on remand is whether the United States Bureau of Customs (Customs) violated due process in handling an administrative petition for remission or mitigation of the forfeiture of an automobile seized at the border. In our earlier decision, we held that Customs violated John von Neumann's due process rights by failing to process von Neumann's petition for over a month after the petition was filed. *See Von Neumann v. United States*, 660 F.2d 1319, 1326 (9th Cir. 1981). After reconsideration in light of *$8,850*, we reaffirm our earlier conclusion that due process rights attach to the processing of a petition for remission. We remand to the district court, however, for determination of whether the delay violated von Neumann's due process rights.

FACTS

Our earlier decision fully explored the events surrounding the seizure of von Neumann's 1974 Jaguar Panther automobile at the United States border checkpoint of Blaine, Washington on January 20, 1974. *See* 660 F.2d at 1321-22. In brief, von Neumann shipped the automobile from Switzerland, where he had purchased it, to Vancouver, Canada, where he obtained a release from Canadian authorities to transport the automobile to the United States. At the Blaine checkpoint, von Neumann failed to declare the automobile and Customs seized the vehicle pursuant to 19 U.S.C. § 1497 (1976).[1]

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[1] 19 U.S.C. § 1497 (1976) provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was be-

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred" pursuant to 19 U.S.C. § 1618 (1976),[2] in which he stated that he had intended to deliver the Canadian release papers to Canadian Customs, but had mistakenly arrived at the United States Customs instead. On February 3, von Neumann posted a cash bond of $24,500 to secure release of the vehicle. Customs acted on the petition on February 25, and informed von Neumann that the penalty for failing to declare the car was reduced to $3,600. The Regional Commissioner of Customs subsequently upheld this deter-

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gun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

[2] 19 U.S.C. § 1618 (1976) provides in part:

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such a fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

mination on April 14. On remand, von Neumann argues that the delay by Customs in acting on his petition from January 20 to February 25 constituted a denial of due process.[3]

DISCUSSION

I.

Due Process Right to a Prompt Determination of the Petition

In our original decision on this appeal, we held that "due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618." 660 F.2d at 1326. Subsequent to our decision, the United States Supreme Court rendered its decision in *United States v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, —— U.S. ——, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983), which prompted this remand. We therefore reexamine our earlier holding in light of *$8,850*.

In *$8,850*, claimant Mary Vasquez failed to declare to Customs on September 10, 1975, that she was transporting monetary instruments exceeding $5,000 into the United States, a violation of section 231 of the Bank Secrecy Act of 1970, 31 U.S.C. § 1101 (1976). Customs subsequently discovered $8,850 in currency in Ms. Vasquez's possession, and seized it from her pursuant to 31 U.S.C. § 1102 (1976). A week later, Vasquez filed a petition for

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[3] The Supreme Court decision in *$8,850* does not disturb our earlier decision upholding the initial seizure of the vehicle under 19 U.S.C. § 1497. We therefore affirm the district court's determination that von Neumann violated section 1497 and that seizure of the vehicle was proper.

remission or mitigation. Throughout the remainder of 1975 and until May 1976, the Customs Office of Investigation conducted an investigation to determine whether the seized currency was part of a narcotics transaction. In May 1976, Customs referred the case to the United States Attorney, recommending that Vasquez be prosecuted for the reporting violation. During the ensuing criminal prosecution, Customs withheld determination of the petition for remission because the currency was needed as evidence at the criminal trial. Vasquez was convicted of the criminal violation on December 24, 1976.[4] On March 10, 1977, Customs denied the petition for remission, and referred the claim of forfeiture to the United States Attorney.

On appeal before the Supreme Court, Vasquez argued that the Government's dilatory processing of the petition and 18-month delay in filing the judicial forfeiture action violated due process. The Government countered that there was no general due process requirement of prompt post-seizure filing of a judicial forfeiture action; only a deliberate delay by the Government in order to gain an unfair tactical advantage, or a reckless disregard by the Government of the prejudicial impact of delay on the defendant, could justify dismissal of the forfeiture action. The Court found, however, that due process required a prompt filing of the forfeiture petition. —— U.S. at ——, 103 S.Ct. at 2011. The Court adopted a four-part balancing test in order to determine whether the delay between the seizure and the filing

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[4] The conviction subsequently was reversed because the court files were left in the jury room during deliberations. *United States v. Vasquez*, 597 F.2d 192 (9th Cir. 1979).

of a judicial forfeiture action under 31 U.S.C. § 1102 violated the claimant's due process rights. *Id.*

$8,850 presented a somewhat different issue from that arising in the instant case.[5] A claimant may have a more compelling constitutional claim to a prompt review of the forfeiture by an independent judicial officer than he has to an administrative review of the forfeiture by Customs itself. Further, the substantive disposition of remission petitions is committed to Customs' discretion, and we will not review the merits of a claimant's petition. *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d

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[5] The Bank Secrecy Act, at issue in *$8,850*, contains its own remission provision. *See* 31 U.S.C. § 1104 (1976). Von Neumann's petition, by contrast, was filed under 19 U.S.C. § 1618 (1976). Claimant Vasquez, in *$8,850*, argued that the Government's dilatory processing of her petition for remission and the dilatory commencement of a civil forfeiture action violated her right of due process. —— U.S. at ——, 103 S.Ct. at 2010. Both the Court of Appeals and the Supreme Court however, focused only on whether the delay in filing the forfeiture action violated due process. *See $8,850*, —— U.S. at ——, 103 S.Ct. at 2010-11; 645 F.2d 836, 838 (9th Cir. 1981). Neither court directly addressed the issue we reach here, the due process requirement of prompt processing of the petition for remission.

Although the Court did not directly discuss whether a delay in the processing of a petition for remission might violate due process, it does offer some guidance on the issue. The Court stated that an important justification for delay "is to see whether the Secretary's decision on the petition for remission will obviate the need for judicial proceedings." *$8,850*, —— U.S. at ——, 103 S.Ct. at 2013. It further emphasized that delay in the processing of a petition can favor both claimant and Government. *Id.* We understand the thrust of the Supreme Court's opinion to be that delay can benefit a claimant, rather than deprive him of due process, by avoiding costly and formal judicial proceedings. *Id.*

1233, 1236 (9th Cir. 1976). *$8,850*, therefore, does not necessarily impel the conclusion that due process requires a prompt determination of a petition for remission or mitigation under 19 U.S.C. § 1618.

Nevertheless, the Supreme Court's holding in *$8,850* reinforces our earlier view that due process rights attach to the processing of the petition for remission. As we observed in our earlier decision in this case:

> [f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the confiscated vehicle.

660 F.2d at 1326, *quoting United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977). We find nothing in *$8,850* to disturb this conclusion. Consequently, we reaffirm our holding that due process requires Customs to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618.

II.

Application of Due Process Standards to the Processing of Von Neumann's Petition

In our earlier decision, we noted that neither judicial decisions nor administrative regulations had established standards for prompt action in the administrative consideration of a petition for remission. *See* 660 F.2d at 1326. This absence of standards prompted the court to establish guidelines to ensure the due process rights of administrative claimants. *Id.* Specifically, we held that in cases

involving vehicles of transportation, the district director should, whenever feasible, act on a petition for remission or mitigation within 24 hours of receipt. 660 F.2d at 1327.

Upon reconsideration in light of *$8,850*, however, we are persuaded that our attempt to set specific time frames for the processing of administrative petitions was ill-advised. Instead, we are guided by the Supreme Court's teaching in *$8,850*, that "due process is flexible and calls for such procedural protections as the particular situation demands." —— U.S. at ——, 103 S.Ct. at 2012, *quoting Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Due process inquiries necessarily must proceed on an ad hoc basis, and the outcome will depend on the facts of the particular case.

The analysis employed by the Supreme Court in *$8,850* provides an appropriate framework for determining whether the delay here violated von Neumann's due process rights. To determine whether government delay had abridged due process, the *$8,850* Court examined four factors: the length of the delay, the reason for the delay, the defendant's assertion of his rights, and prejudice to the defendant occasioned by the delay.[6] —— U.S. at ——,

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[6] We find the due process analysis of *$8,850* to be compatible with the balancing approach of *Stypmann v. City & County of San Francisco*, 557 F.2d 1338, 1342 (9th Cir. 1977), and *Lee v. Thornton*, 538 F.2d 27, 33 (2d Cir. 1976), upon which we relied in our earlier decisions. To determine whether due process had been satisfied, *Stypmann* and *Lee* balanced the interest of the government against the interest of the individual. This analysis necessarily required some consideration of the length of the delay, the reason for the delay, the claimant's assertion of his right, and the prejudicial impact of the

103 S.Ct. at 2011-12. *See also Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 2192, 33 L.Ed.2d 101 (1972). The Court noted that:

> none of these factors is a necessary or sufficient condition for finding unreasonable delay. Rather, these elements are guides in balancing the interests of the claimant and the Government to assess whether the basic due process requirement of fairness has been satisfied in a particular case.

—— U.S. at ——, 103 S.Ct. at 2012.

Because the outcome depends heavily on the facts, the balancing of these four factors properly should occur first in the district court. Consequently, we remand to the district court for consideration of whether the due process requirement of fairness has been satisfied here, in light of the *$8,850* test.

Without any way attempting to foreclose the district court's decision, however, we feel it is appropriate to suggest several factors the court may wish to consider in reaching its determination. As *$8,850* noted, the overarching factor is the length of delay, which acts to some extent as a "triggering mechanism" for due process analysis:

> [W]hen a delay becomes presumptively improper . . . necessarily depends on the facts of

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delay upon the vehicle's owner. In our earlier decision, for example, we noted that Customs might take somewhat longer than 24 hours to process the petition if unusual circumstances so required. 660 F.2d at 1327 n. 16. Nevertheless, we expressly adopt here the due process analysis of *$8,850* in order to make clear the factors that have weight in the balancing process, and to avoid any suggestion that the different terminology of *Lee* and *Stypmann* results in a fundamentally different balancing test.

> the particular case. . . . Obviously short delays—of perhaps a month or so—need less justification than longer delays.

$8,850 at 4590.[7] To this we would add that the propriety of the delay may turn to a great extent upon the nature of the item that has been seized. We have previously recognized the special hardships imposed on persons deprived of the use of their automobiles:

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra,* 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances, held that due process required action on a petition for rescission [remission?] or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Stypmann v. City & County of San Francisco, 557 F.2d 1338, 1344 (9th Cir. 1977). The potential consequences may be particularly grave when the seizure, as here, leaves a traveler without transportation at a remote border point. *See Lee v. Thornton,* 538 F.2d 27, 31 (2d Cir. 1976).

Closely allied to the length of delay is the reason the Government assigns to justify the delay. *$8,850,*

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[7] The *$8,850* Court found that the Government's 18 month delay in filing the petition for forfeiture did not violate due process because the delay was caused by an ongoing criminal investigation and prosecution. —— U.S. at ——, 103 S.Ct. at 2014-15.

—— U.S. at ——, 103 S.Ct. at 2012-13. The record here provides no obvious reason for the Government's one-month delay in processing von Neumann's petition, although we note that Customs processes a great number of petitions each year.[8] It appears that, at the time of the seizure, Customs may have had all of the facts at hand necessary for an expeditious determination of the petition. Von Neumann had admitted both the origin of the vehicle and his failure to declare the automobile. There is no suggestion that von Neumann or the vehicle might have been involved in illegal activity other than the reporting violation and that Customs delayed processing the petition to allow an investigation as in *$8,850*.[9]

It is also undisputed that von Neumann filed his petition for remission at the time his vehicle was seized, which seems a sufficient assertion of his rights.

The final factor in the analysis is the prejudice to the individual caused by the delay. In addition to

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[8] The Customs Service processes over 50,000 noncontraband forfeitures per year. In 90% of all seizures, the claimant files an administrative petition for remission or mitigation. The Secretary grants at least partial relief for an estimated 75% of the petitions. *$8,850*, —— U.S. at ——, 103 S.Ct. at 2009.

The Supreme Court in *$8,850* recognized that delays of a month or so require less explanation than more lengthy delays. That Court, however, did not imply that no explanation at all is required. *Id.* at ——, 103 S.Ct. at 2012-13.

[9] The investigation in *$8,850* required responses from state, federal and Canadian law enforcement officials. The Supreme Court found no evidence that the Government had not pursued its investigations diligently in *$8,850*, or that delays in the criminal prosecution were caused by the Government. *$8,850* at ——, 103 S.Ct. at 2012-13.

possible loss of essential witnesses or evidence, a claimant may also be prejudiced by unanticipated, unrecoverable, expenses resulting from a seizure of his vehicle, sudden disruption of travel plans, inconvenience, or even peril, he thereby experiences. *See, e.g., Stypmann*, 557 F.2d at 1342-43; *Lee*, 538 F.2d at 33.

After weighing these and such other factors the district court considers relevant, the court should determine whether the delay violated due process and enter an appropriate judgment.

CONCLUSION

The district court's finding that von Neumann violated 19 U.S.C. § 1497 by failing to declare his car is not clearly erroneous; therefore the seizure of his car was proper. We remand, however, for determination of whether the delay in processing von Neumann's petition for remission or mitigation violated his due process right to prompt consideration of his claim, in light of the *$8,850* balancing test.

AFFIRMED in part and REMANDED in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

[Filed Sept. 18, 1984]

ORDER

Before: TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-3761

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; AND DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Central District of California

Argued and Submitted June 3, 1981

Decided Nov. 2, 1981

Before TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge.

BOOCHEVER, Circuit Judge.

This appeal presents the issue of whether the procedures followed by the United States Bureau of Customs (Customs) in processing an administrative

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

petition for remission or mitigation of the forfeiture of an automobile seized at the border for failure of the owner to make the required declaration, were consistent with due process. John von Neumann's foreign-bought car was seized by Customs officials at the Canadian-United States border after he failed to declare the car upon entering the United States. On the day of the seizure, von Neumann filed an administrative claim for remission or mitigation, and later recovered the car after posting a bond as security. Over a month after the petition was filed, Customs remitted $20,900 to von Neumann, but retained $3,600 as a penalty.

Von Neumann filed a complaint in district court, challenging the penalty and the procedures used to assess it. The district court found that von Neumann violated 19 U.S.C. § 1497 by failing to declare the car and thus the seizure was proper. Additionally, the court found that the remission procedure was proper. We agree that seizure was proper under section 1497, but find fatal due process violations in the remission procedure.

FACTS

In 1974, von Neumann purchased a 1974 Jaguar Panther automobile in Switzerland and shipped it to Vancouver, Canada. Prior to shipment, von Neumann registered the car in California and obtained California license plates. On January 20, 1975, von Neumann picked up the car in Vancouver and obtained a release from Canadian Customs to take possession. Canadian Customs officials gave von Neumann form A8A, which authorized transportation of the car to the border, and instructed him to deliver

the form to the Canadian Customs border station before leaving the country.

Von Neumann and a friend arrived at the United States border checkpoint at Blaine, Washington at 5:00 p.m. on January 20. The Blaine checkpoint is across the highway and slightly south of the Canadian border station. The highway approaching the Blaine Station is a multilane highway with several turnoffs for the Canadian Customs building. Von Neumann testified that he inadvertently passed the Canadian station because of poor visibility and inadequate directions. For whatever reasons, von Neumann arrived at the Blaine checkpoint without having delivered form A8A to Canadian Customs.

At the Blaine checkpoint, von Neumann and his passenger were briefly questioned by United States Immigration Officer Perkins.[1] Canadian Customs officials had earlier alerted United States Customs that von Neumann's car would be crossing the border, and Perkins matched the description to the car before questioning the occupants. Perkins asked questions relating to citizenship, and specifically asked von Neumann whether he had anything to declare. When von Neumann failed to declare the automobile, Perkins asked him into the checkpoint station and referred the case to Customs Inspector Morrison. Upon being asked why he had not declared the car, von Neumann explained that he did not think he was

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[1] Harley Perkins was an Inspector for the Immigration and Naturalization Service, but had been serving as a designated Customs Officer since August 16, 1974. See 19 U.S.C. § 1401(i). His designation form indicates that he was to receive training necessary to serve as a Customs Inspector for arriving vehicles, aircraft, and vessels.

required to declare it. Morrison then seized the vehicle pursuant to 19 U.S.C. § 1497.[2]

Immediately after the car was seized, von Neumann prepared a "Petition for Remission or Mitigation of Forfeiture and Penalties Incurred," *see* 19 U.S.C. § 1618,[3] explaining that he had intended to deliver the Canadian Customs papers to Canadian Customs but had mistakenly arrived at United States Customs instead. After filing the petition, von Neumann arranged for other transportation into the United States, and left his car with Customs.

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[2] 19 U.S.C. § 1497 provides:

> Any article not included in the declaration and entry as made, and, before examination of the baggage was begun, not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article.

[3] 19 U.S.C. § 1618 provides in part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

On February 3, 1975, von Neumann posted a bond for $24,500, the value of his car, and Customs returned the vehicle.[4] On February 25, 1975, the Seattle Director of the Bureau of Customs[5] informed von Neumann that the penalty for failing to declare the car was being reduced to $3,600, and therefore $20,900 would be refunded. Von Neumann requested administrative review of this determination, and on April 14, 1975, the Regional Commissioner of Customs in San Francisco upheld the $3,600 penalty assessment.

Having exhausted his administrative remedies, von Neumann filed a complaint in district court on October 14, 1975, seeking: (a) return of the $3,600; (b) injunctive relief to prevent Customs from placing his name on a computer list of violators; (c) a declaration that the seizure and penalty were unlawful.[6] The district court found that von Neumann

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[4] Customs officials have the discretion to release a seized vehicle if the person claiming an interest has a "substantial interest therein." 19 U.S.C. § 1614. In this case Customs required a bond for what it considered the value of the car, as security to cover the penalty assessed. *See* 19 C.F.R. §§ 162.41(a), 162.43, 162.44(b) (1980).

[5] By statute, the Secretary of the Treasury acts on petitions for remission or mitigation. 19 U.S.C. § 1618. This authority has been delegated to district directors in cases where the total value of the merchandise forfeited does not exceed $25,000. 19 C.F.R. § 171.21 (1980). The estimated value of von Neumann's car, $24,500, thus fell within the district director's regulatory authority.

[6] Customs filed a counterclaim requesting recovery of the full $24,500 in accordance with 19 U.S.C. § 1497. This claim was apparently based on the argument that since Customs has complete discretion over a petition for remission, von Neumann's challenge reopened the determination and Customs

violated 19 U.S.C. § 1497, and therefore seizure of the car was proper. The court also found that the remission and mitigation procedures were proper, and entered judgment for the government. Von Neumann appeals, challenging the imposition of the penalty as well as the procedures followed by Customs.

DISCUSSION

I. Violation of 19 U.S.C. § 1497

Von Neumann contends that the district court erred in finding that he violated section 1497, because he was never given an adequate opportunity to declare the car. The district court's determination that von Neumann was given an adequate opportunity to declare and yet failed to declare his car is a factual one, which we will not overturn unless clearly erroneous. *United States v. Wagner*, 434 F.2d 627, 628-29 (9th Cir. 1970). *See Vesey v. United States*, 626 F.2d 627, 629 (9th Cir. 1980). The record fully supports the district court's conclusion that von Neumann attempted to introduce his car into United States commerce without declaring it, despite an opportunity to do so.

Officer Perkins testified that he asked von Neumann if he had purchased or acquired anything outside of the United States that he was bringing back into the country,[7] and then asked if he had anything

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could now assess the full penalty value for the failure to declare. *See United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). The district court denied Custom's counterclaim, and Customs has not appealed that aspect of the judgment.

[7] Von Neumann claims that Perkins asked whether he had purchased anything in Canada, and he responded negatively

to declare. Von Neumann thus had two opportunities to declare the car, yet failed to do so.[8] It is irrelevant whether von Neumann was looking for the Canadian Customs building and did not intend to enter the United States without declaring the car. As the Supreme Court has held,

> "[t]o succeed in a forfeiture action under § 1497 . . . the Government need only prove that the property was brought into the United States without the required declaration; the Government bears no burden with respect to intent."

One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234, 93 S.Ct. 489, 491, 34 L.Ed.2d 438 (1972). In demonstrating that von Neumann failed to declare the car, Customs has shown that the car was subject to forfeiture and that its owner is "liable to a penalty equal to the value of such article [the undeclared car]." 19 U.S.C. § 1497.

Von Neumann argues that because Customs regulations required a written declaration for articles exceeding $25 in value, his oral statement failing to declare the car did not constitute a violation of section 1497. 19 C.F.R. § 148.-12(b)(2) (1980). This

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because the car was purchased in Switzerland. Perkins testified that his questioning was not limited to purchases in Canada, but included acquisitions anywhere outside the United States. The district court apparently credited Perkins' testimony.

[8] We note also that von Neumann was an experienced importer who had been shipping automobiles between Europe and the United States for over twenty years, and had personally crossed international borders "innumerable times." In spite of this background, von Neumann failed to mention the car after a specific Customs request.

argument is without merit. Perkins was not under any obligation to request a written declaration until von Neumann had orally declared the car, nor did von Neumann ever attempt to submit a written declaration.

Von Neumann's final argument is that he was entitled to amend his declaration up until the time his baggage was searched. Although an amendment is proper under Customs regulations, the undeclared item must be "brought to the attention of the examining officer by the passenger." 19 C.F.R. § 148.16 (a) (1980). Von Neumann failed to do this. Moreover, Customs was not required to search his baggage. The statute states that customs officers "*may* cause an examination to be made of the baggage . . . ." 19 U.S.C. § 1496 (emphasis added). Section 1496 does not provide protection from seizure up until the time a formal baggage search is conducted. The "search" took place when Officer Perkins observed the car and matched it to the description provided by Canadian Customs.

The district court's finding that von Neumann failed to declare his car, after an adequate opportunity to do so, is not clearly erroneous. We therefore affirm the district court determinations that von Neumann violated section 1497 and that seizure of the vehicle was proper.[9]

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[9] Because we affirm this portion of the district court judgment, von Neumann is not entitled to have his name removed from Customs' computer list of persons who have failed to declare merchandise, as requested in his prayer for injunctive relief.

II. Due Process Challenge to the Administrative Procedure under 19 U.S.C. § 1618

A. Petition for Remission or Mitigation

Under 19 U.S.C. § 1618, a person whose property is seized and subject to forfeiture may file an administrative petition for remission or mitigation of the penalty. *See* note 3, *supra*. In cases where the forfeiture value does not exceed $25,000, the district director may remit or mitigate the penalty "under the law and in view of the circumstances, [as] he shall deem appropriate . . . ." 19 C.F.R. § 171.21 (1980). The administrative remission process is independent of a judicial action for forfeiture, which must be initiated promptly. 19 U.S.C. §§ 1602-04; *Seguin v. Eide*, 645 F.2d 804, 808 (9th Cir. 1981); *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977). In this case, judicial forfeiture proceedings were never initiated; we are only concerned with the propriety of the administrative procedures followed by Customs.

The substantive disposition of remission petitions is committed to the Customs Bureau's discretion, and we will not review its decision on the merits of a claimant's petition. *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976). In this case, however, von Neumann is challenging the procedures utilized to reach the substantive decision. Specifically, he claims that the delay of over a month in acting on his petition was a denial of his fifth amendment right to due process.[10]

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[10] Because border seizure is an "extraordinary situation" requiring immediate action, the ordinary due process requirements of notice and hearing prior to deprivation of property

B. Due Process Right to a Prompt Determination

The cases interpreting 19 U.S.C. §§ 1602-04, requiring prompt initiation of judicial forfeiture proceedings, make it clear that due process depends on the circumstances of each individual case. *See e.g. Seguin v. Eide*, 645 F.2d 804, 808-09 (9th Cir. 1981) (delay of almost 5 months excessive); *United States v. One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977) (delay of 11 months excessive); *United States v. One 1973 Buick Riviera Automobile*, 560 F.2d 897, 901 (8th Cir. 1977) (delay of 5 months justified). The rule in this circuit is that filing of a petition for remission under section 1618 does not excuse Customs from its burden of prompt referral for judicial forfeiture. *Ivers v. United States*, 581 F.2d 1362, 1372 (9th Cir. 1978).

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are not required. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 678-80, 94 S.Ct. 2080, 2090, 40 L.Ed.2d 452 (1974); *Ivers v. United States*, 581 F.2d 1362, 1367-68 (9th Cir. 1978). Customs argues that this was the only issue before the district court, and therefore von Neumann is precluded from arguing that a prompt post-seizure hearing is required.

The pre-trial conference order indicates that one of the issues of law to be considered was:

> "Is the procedure which was instituted against Plaintiff and the Automobile, whereby the Automobile may be forfeited and seized, and then remission and mitigation proceedings begun, an unconstitutional violation of the due process clause of the Fifth Amendment to the United States Constitution." The issue is framed in sufficiently general terms to include both pre- and post-seizure due process requirements. Moreover, the case of *Lee v. Thornton*, 538 F.2d 27 (2d Cir. 1976), which found post-seizure administrative delay to be a due process violation, was cited and discussed below. We therefore conclude that the propriety of the post-seizure administrative delay is properly before this court.

By contrast, there has been little interpretation of the due process requirements for the remission procedure itself, when judicial proceedings have not been initiated.[11] This is perhaps in part because the statutory language authorizing remission does not place any time restrictions on Customs, while the judicial referral statutes use the terms "immediately," "promptly," and "forthwith". *Compare* 19 U.S.C. § 1618 *and* 19 C.F.R. §§ 171.11-171.33 (1980) *with* 19 U.S.C. §§ 1602-04. The absence of statutory language does not eliminate the constitutional requirement of due process, however. The informal, remedial nature of the administrative petition makes rapid processing essential.

The purposes of the section 1618 remission process have been described as follows:

> [F]irst, to permit an administrative review of the propriety of the seizure and the equities involved before any formal court action begins, and second, to give a claimant to seized property a quick, expeditious method of getting his property back without the necessity of hiring a lawyer to defend a court proceeding.

United States v. Eight (8) Rhodesian Stone Statutes, 449 F. Supp. 193, 202 (C.D. Cal. 1978). The need for

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[11] A panel of this court recently held that the owner of a vehicle seized for a drug violation under 21 U.S.C. § 881(a) did not have a due process right to a probable cause hearing within 72 hours of seizure. *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, at 819-820 (9th Cir. 1981). The panel found that the strong government interest in enforcing narcotics laws outweighed the individual interest at stake. The *One 1971 BMW* panel was not faced with a challenge to the promptness of remission procedures, since a petition for remission was never filed. *See* at 821-822.

prompt action is particularly acute where the seized property is an automobile, because "both the necessities and amenities of life may depend upon the availabilities of an automobile when needed." *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1343 (9th Cir. 1977). *See United States v. One 1971 Opel G.T.*, 360 F. Supp. 638, 641 (C.D.Cal. 1973) (automobile is a rapidly depreciating asset). In this case von Neumann was not only deprived of an asset, he was left without transportation at the border, a potentially serious consequence for many travelers. *See Lee v. Thornton*, 538 F.2d 27, 31 (2d Cir. 1976).

Lee is the only case directly addressing the due process argument advanced by von Neumann. Lee was accused of using his van to bring undeclared persons, merchandise, and marijuana into the country. The van and merchandise were seized, and Lee was assessed a penalty equal to the value of the van. He was informed that the van and merchandise were subject to forfeiture and that he could file a petition for remission or mitigation under section 1618. Lee filed a petition within a few days of seizure and recovered the van after paying $100, the amount of the reduced penalty.[12]

The *Lee* court reversed the penalty assessment because Customs failed to provide Lee with a prompt hearing on his remission petition. The court first balanced the serious nature of the individual property deprivation against the inconvenience to government

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[12] *Lee* was a consolidated appeal, and the factual circumstances of appellant Rich's cases were similar to Lee's. Although seizure in *Lee* was pursuant to 19 U.S.C. §§ 1460, 1594, and 1595a, and in the instant case was pursuant to 19 U.S.C. § 1497, *Lee* was an interpretation of the remission statute at issue here: 19 U.S.C. § 1618. 538 F.2d at 31.

in providing a prompt determination of the legality of the detention. 538 F.2d at 33. An important factor in the individual's interest is the hardship that even a temporary deprivation of an automobile might cause. *See Stypmann*, 577 F.2d at 1343; *One 1971 Opel G.T.*, 360 F. Supp. at 641. On the other hand, once a seizure is accomplished, the government's justifications for delaying a hearing are not compelling. *Wiren v. Eide*, 542 F.2d 757, 761 n.6 (9th Cir. 1976). After balancing the competing interests, the *Lee* court held:

> [W]hen vehicles are seized for forfeiture or as security, action on petitions for mitigation or remission should be required within 24 hours, with notice of the charge, and with opportunity to file a written response and to make an oral appearance and that, if requested, some kind of hearing on probable cause for the detention before an officer other than the one making the charge should be provided within 72 hours if the petition is not granted in full.

538 F.2d at 33.

Although not bound by the Second Circuit's holding in *Lee*, we find its reasoning persuasive. This court expressly relied on the *Lee* rationale to invalidate a California towing and possessory lien statute[13] in *Stypmann v. City & County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977). The statute in *Stypmann* granted towing companies, who had possession of a car because of a traffic violation, a possessory lien on the vehicle to insure recovery of towing and storage fees. The court held that this statute could not with-

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[13] Cal. Veh. Code § 22851.

stand a due process attack because it did not provide for a prompt post-seizure hearing to determine probable cause for the seizure. The *Stypmann* court stated:

> A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle. *Lee v. Thornton, supra,* 538 F.2d at 33, a case involving seizure and detention of automobiles in comparable circumstances, held that due process required action on a petition for recission [remission?] or mitigation within 24 hours, and, if the petition was not granted in full, a hearing on probable cause within 72 hours.

Id. at 1344 (footnote omitted).[14] *Lee* was also cited for the propositions that a car is an important individual asset, *id.* at 1342 n.8 & 1344 n.22, and that a court must balance governmental and individual interests to determine due process, *id.* at 1342.

The government contends that *Ivers v. United States*, 581 F.2d 1362 (9th Cir. 1978), stands for the proposition that the due process requirements of prompt notice and hearing only apply to judicial forfeiture proceedings, not administrative proceedings under 19 U.S.C. § 1618. The issue in *Ivers*, however, was whether the filing of an administrative petition operated as a waiver of a claimant's right to a prompt forfeiture action. The court held that it did not. *Id.* at 1370. In dicta, the *Ivers* court stated:

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[14] *Stypmann* held that five days was too long of a delay, but did not establish what time period would be proper 557 F.2d at 1344-45.

> Administrative consideration of a claimant's petition for remission is not governed by any statutory or regulatory requirement of promptitude. Nor does it not afford a claimant the full panoply of due process rights inherent in a judicial proceeding. Remission being a matter of legislative grace, the exercise of the Secretary's discretion is not reviewable by the courts.

Id. at 1371. The tone of this statement indicates that the word "not" in the second sentence may be a misprint. It seems that the court was merely emphasizing the informal nature of the administrative process. We agree that an administrative hearing does not require all the protections of a judicial hearing, but we believe a claimant is entitled to prompt disposition of an administrative claim.

The balance of the *Ivers* opinion suggests that due process does require a prompt resolution of administrative claims. The court noted that administrative proceedings are informal and inexpensive, and will often obviate the need for judicial action since remission petitions are frequently granted. *Id.* at 1370. If time limits are not imposed on the administrative process, the government might be forced to bring a judicial action prior to the completion of the administrative claim. Once a case is referred for judicial action, the administrative proceedings on a petition for a remission must cease. 19 C.F.R. § 171.2(a) (1980). Therefore delay in ruling on a claimant's petition could force a more cumbersome and time-consuming judicial forfeiture action. *See Ivers*, 581 F.2d at 1370, *United States v. Eight (8) Rhodesian Stone Statutes*, 449 F. Supp. 193, 202 (C.D.Cal. 1978). The rationale of the *Lee* case is further supported by cases from this circuit. In *United States v.*

One 1970 Ford Pickup, 564 F.2d 864 (9th Cir. 1977), we stated: "[f]rom the standpoint of the claimant, the stage of the procedures at which excessive delay occurs is irrelevant. His concern, and the concern of the statutory scheme, is the quick and efficient determination of the property rights in the conficated vehicle." *Id.* at 866 (referring to various stages of the judicial forfeiture procedure). The United States District Court for the Central District of California, citing *Lee*, noted that "[a] growing number of decisions enunciate the proposition that *both* the adjudication of the administrative claim and the filing of a court action when required, must be speedily done." *Eight (8) Rhodesian Stone Statutes*, 449 F. Supp. at 200 (emphasis added). *See also Pollgreen v. Morris*, 496 F. Supp. 1042, 1051-53 (S.D.Fla. 1980) (invalidating seizure of vessels used in Cuban "Freedom Flotilla" for failure to provide prompt post-seizure hearings; relying on *Lee* and *Stypmann*); *F/V American Eagle v. State*, 620 P.8d 657, 666-67 (Alaska 1980) (citing *Lee* and *Stypmann* for the proposition that a post-seizure hearing must be prompt even when the government interest is "urgent"). We therefore adopt the *Lee* rationale and hold that due process requires the Customs Bureau to act promptly in ruling on petitions for remission or mitigation under 19 U.S.C. § 1618. The one month delay in processing von Neumann's petition does not conform to this standard.

C. What constitutes a Prompt Determination

We have concluded that Customs must act on a remission petition promptly and that the one month delay in processing von Neumann's petition was unreasonable. This court has not yet formulated specific

standards, but we are guided by the *Stypmann* court, which held that a five-day delay in providing a hearing violated due process. *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977). Although Customs regulations provide specific requirements for remission petitions, including a 60 day limitation on filing a petition, the regulations do not place any time constraints on administrative consideration of a petition. 10 C.F.R. § 171.12(b) (1980); *See generally* 19 C.F.R. §§ 171.11-171.33 (1980).

In the absence of any appropriate regulatory provisions, we find that the imposition of guidelines is necessary to ensure the due process rights of administrative claimants. No showing has been made that the time limits set by the Second Circuit in *Lee* have proved unreasonably burdensome. We hold that in cases involving vehicles of transportation within a district director's authority under 19 C.F.R. § 171.21 (1980),[15] the director must ordinarily, depending upon the nature of the article seized,[16] act on a peti-

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[15] The district director has authority to act in cases involving a total value of merchandise not exceeding $25,000. *See* note 5 *supra*. The due process requirements for cases involving greater value than $25,000, which are decided by the Commissioner of Customs, are not before us. *See* 19 C.F.R. § 171.11(a) (1980). We note that the greater the value of the merchandise, the greater the potential for a burden on individual rights. On the other hand, the administrative machinery may need more time to operate when the district director is not authorized to act.

[16] Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process.

tion for remission or mitigation within 24 hours of receipt. The claimant must be allowed the opportunity to make an oral appearance to argue his or her claim. Because the administrative delay in processing von Neumann's petition violated his due process rights, we reverse and remand with instructions to enter judgment for von Neumann in the amount of $3,600 plus costs. *See Lee*, 538 F.2d at 33.

CONCLUSION

The district court finding that von Neumann violated 19 U.S.C. § 1497 by failing to declare his car is not clearly erroneous, therefore the seizure of his car was proper. The delay in processing von Neumann's petition for remission or mitigation, however, violated his due process right to prompt consideration of his claim. Because we hold that Customs must ordinarily act on a petition for remission within 24 hours of receipt, we reverse and remand with instructions to enter judgment for the plaintiff.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-3761

DC No. 75-3453-RF

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

[Filed May 1, 1982]

ORDER

Before: TANG and BOOCHEVER, Circuit Judges, and PRICE,* District Judge

The Opinion in the above-entitled case is modified as follows:

(1) At page 5512 of the slip opinion, second paragraph, left column, the third sentence is amended to read:

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* Honorable Edward Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

We hold that in cases involving vehicles of transportation within the district director's authority under 19 C.F.R. § 171.21 (1980),[15] the director should whenever feasible [16] act on a petition for remission or mitigation within 24 hours of receipt.

(2) Footnote 16 is amended to read as follows:

[16] Unlike the court in *Lee*, we have set forth times to be followed under ordinary circumstances. We do not preclude the possibility of some reasonable extension being permissible if unusual circumstances, such as holidays or unavailability of essential information or of needed personnel, require some brief delay. A claimant might also waive delays in the administrative process. We further do not foreclose the promulgation of a regulation setting forth any appropriate standard in accordance with the principles set forth in this opinion.

The panel as contituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

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UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 75-3453-RF

JOHN VON NEUMANN, PLAINTIFF

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS

[Sept. 20, 1979]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for court trial before the Honorable Robert Firth, United States District

Judge, and after a thorough consideration of the evidence presented therein, the Court makes the following findings of facts and conclusions of law:

FINDINGS OF FACT

I

In or about June, 1974 plaintiff purchased a 1974 Panther automobile (hereinafter "automobile") in Switzerland shipped it to Vancouver, Canada with the intention of bringing it into the United States.

II

Prior to importation into the United States, plaintiff had the automobile registered in the state of California and obtained California license plates for the automobile.

III

On January 20, 1975, plaintiff and Paul R. Ginther went to the warehouse at the docks in Vancouver, British Columbia where the automobile was being kept, and obtained a release from Canadian Customs to take possession of the automobile. Plaintiff was given Canadian Customs form A8A which authorized him to transport the car from Vancouver to the location of Canadian Customs near the Canadian-United States border in British Columbia. Plaintiff was instructed to deliver form A8A to Canadian Customs upon leaving Canada.

IV

The Canadian Customs office at which plaintiff was to deliver form A8A is known as the Pacific Highway station, and is located across the highway and a little north of the Blaine, Washington, United States border

checkpoint. The highway approaching the Blaine, Washington, checkpoint is a multi-lane highway. There were several turn-offs from the highway to the Canadian Customs building prior to reaching the United States border checkpoint. Nevertheless, plaintiff failed to stop and deliver form A8A to Canadian Customs officials.

V

United States Customs Officials at the Blaine, Washington, checkpoint station had been informed by Canadian Customs officials that an automobile had arrived from a foreign country and had been consigned to plaintiff. Such information included the description and license plate number of the automobile.

VI

Plaintiff and Mr. Ginther arrived in the automobile at the United States border checkpoint at Blaine, Washington, at approximately 5:00 p.m., and they were confronted by United States Immigration Officer Harley Perkins.

VII

Officer Perkins asked several questions of plaintiff and Mr. Ginther relating to the citizenship and birthplace of plaintiff and Mr. Ginther, whether Plaintiff and Mr. Ginther had any firearms or alcohol in the automobile, and whether they had anything to declare to Customs.

VIII

Plaintiff failed to declare the automobile to the United States Customs official. By doing so, plaintiff attempted to introduce the automobile into the commerce of the United States contrary to the Customs laws of the United States.

IX

The automobile was retained by the customs officials, and Plaintiff and Mr. Ginther took a taxi into the United States, where they arranged for other transportation.

X

Within a couple of weeks of January 20, 1975, plaintiff offered to pay the amount of $24,500.00, in accordance with 19 U.S.C. § 1614 and 19 C.F.R. § 162.44, to secure the release of the automobile without prejudice to any of his rights, and this offer was accepted by Customs.

XI

Plaintiff, prior to leaving the Blaine, Washington border checkpoint prepared, at the request of customs officials, a Petition for Remission or Mitigation of Forfeiture and Penalties incurred. Thereafter, Plaintiff through his attorneys, proceeded with the remission and mitigation procedures.

XII

In or about March, 1975, a decision was made for remission of penalty of all except $3,600.00 which decision was affirmed upon appeal by the Regional Director in San Francisco, California. The remaining $20,900.00 was returned to plaintiff.

XIII

On October 14, 1975, Plaintiff filed a complaint of return of penalty and declaratory and injunctive relief, seeking to have declared improper the penalty in the amount of $3,600.00 assessed against him pursuant to the customs laws of the United States.

XIV

On February 2, 1976, defendants answered and filed a counter-claim for the forfeiture value ($24,500.00) of the goods which plaintiff attempted to introduce into the commerce of the United States contrary to the applicable statutes and regulations.

XV

To the extent that these findings of fact contain conclusions of law, they shall be deemed incorporated within Conclusions of Law.

CONCLUSIONS OF LAW

I

This court has jurisdiction of this action.

II

Plaintiff violated 19 U.S.C. § 1497 and was subject to penalty or forfeiture thereunder.

III

The seizure of plaintiffs' automobile by the United States Customs officials was proper.

IV

The remission and mitigation procedures were proper.

V

Judgment should be entered for the Defendant on the Complaint and for the Plaintiff and Counter-defendant of the Counterclaim.

VI

To the extent that these Conclusions of Law contain findings of fact, they shall be deemed incorporated within the findings of fact.

DATED: This 20 day of Sept. 1979.

/s/ R. Firth
United States District Judge

PRESENTED BY:

ANDREA SHERIDAN ORDIN
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division
HOWARD GEST
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Attorneys for Defendant.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Civil Action No. 79-3761

D.C. No. 75-3453-RF

JOHN VON NEUMANN, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; SECRETARY OF THE TREASURY; COMMISSIONER OF CUSTOMS; and DISTRICT DIRECTOR OF CUSTOMS FOR THE PORT OF SEATTLE, DISTRICT 30.01, DEFENDANTS-APPELLEES

[Filed May 21, 1984]

DECLARATION OF DONALD W. LEWIS
DIRECTOR, ENTRY PROCEDURES AND PENALTIES DIVISION
OFFICE OF REGULATIONS AND RULINGS
OFFICE OF COMMERCIAL OPERATIONS
UNITED STATES CUSTOMS SERVICE

Donald W. Lewis, being duly sworn, deposes and says:

1. That I am now and since January 1982 (and from 1974 through 1976), have been Director of the Entry Procedures and Penalties Division, Office of Regulations and Rulings, Office of Commercial Opera-

tions, United States Customs Service, with offices located at 1301 Constitution Avenue, N.W., Washington, D.C. 20229. As the Director of the Entry Procedures and Penalties Division, I have direct supervision of two penalty branches, and the Entry, Licensing and Restricted Merchandise Branch. My duties as a supervisor of the two penalty branches includes responsibility for the implementation, review, and evaluation of Customs Fines, Penalties and Forfeitures (FP&F) Program as well as providing leadership, advice and guidance to Customs District Directors and FP&F officers throughout the country concerning the administrative processing of petitions for mitigation or remission and related matters pertaining to the seizure of automobiles and other merchandise for violation of the Customs laws.

2. I have from August 12, 1979 to January 1982 served as Director of the Office of Regulations and Rulings. I was responsible for the development, implementation, and evaluation of Customs servicewide programs, policies and procedures pertaining to regulations and rulings issued by and affecting the Customs Service. In discharging this responsibility, *inter alia*, I exercised supervision over the Entry Procedures and Penalties Division of the Office of Regulations and Rulings. Consequently, I was very involved in and knowledgeable about the Customs Fines, Penalties and Forfeiture Program which among other items included instructions and procedures to be followed in the administrative processing of petitions for mitigation or remission that are filed when automobiles and/or the other merchandise have been seized for forfeiture for violation of the Customs laws. As director, I provided functional supervision and guidance to regional and other field personnel in the area

of the administrative processing of petitions for mitigation or remission as well as in all regulations and rulings matters.

3. That from February 1976 to August 12, 1979, I served as Deputy Assistant Commissioner, Office of Regulations and Rulings, U.S. Customs Service with offices located at 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Among my important duties and responsibilities as Deputy Assistant Commissioner were to review and evaluate Customs regulations and procedures relating to its Fines, Penalties and Forfeitures Program. As a result of court decisions in the 1970's Customs issued on FP&F Handbook in January 1978, which included detailed instructions and procedures to be followed by Customs personnel in the performance of their respective duties in a number of different areas, including the issuance of civil penalties, and the expeditious administrative processing of petitions for mitigation and remission. Subsequently, this Handbook was updated, revised and issued in 1979, as the "March 1979 Revision of the Fines, Penalties and Forfeitures Handbook." I was an active participant in the development and implementation of these FP&F Programs and served as a principal author of the March 1979 revision. I have attached a copy of Chapter IX of the Customs Fines, Penalties, and Forfeitures Handbook, March 1979 revision, which is the version currently in effect and which governs procedures for handling of the administrative petitions. (See Attachment.)

4. That from 1971 to 1975, I was Chief of the Penalties Branch, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. As Chief of the Penalties Branch, I participated in the

formulation of policy and in the development and implementation of regulations and procedures concerning *inter alia* the administrative processing of petitions for mitigation or remission of fines, penalties and forfeitures. Further, as Chief of the Branch I maintained frequent contact with District Directors, FP&F officers and other Customs personnel servicewide involved in the day to day operation of the Customs Fines, Penalties and Forfeitures Program. In this way I was able to keep informed of the successes and with the difficulties and problem areas associated with the practical operation of the FP&F Program.

5. That as a result of my experience and background having served as Deputy Assistant Commissioner, Office of Regulations and Rulings, Director, Office of Regulations and Rulings, Chief of the Penalties Branch, and currently as Director, Entry Procedures and Penalties Division, I have a thorough knowledge and understanding of Customs Fines, Penalties and Forfeitures Program and as such I am familiar with the laws, regulations and procedures pertaining to seizures of merchandise, penalty assessment, the mitigation and remission process and the administrative and judicial forfeiture of seized merchandise.

6. That the Office of the Chief Counsel for the U.S. Customs Service provided me with a copy of the Ninth Circuit's second decision in the above-captioned case. I have read and examined the Court's decision several times to determine its impact on Customs Fines, Penalties and Forfeiture Program. Based on my knowledge and experience with Customs FP&F Program, particularly as it relates to the administrative processing of petitions for mitigation or remission I declare the following:

7. That despite expeditious actions by Customs upon receipt of petitions for mitigation or remission, in a large number of seizure cases, less than three to six months is simply not enough time for Customs to obtain the information which is necessary to make an informed decision on petitions. Under our present procedures (FP&F Handbook Chap. 2 Section 2.3 (d)), when an item is seized, a notice of seizure is sent to the interested parties within 3 days of the seizure, advising them of their right to have the case promptly referred to the United States Attorney for institution of judicial forfeiture proceedings and of the right they have to submit a petition for remission to Customs within 30 days (in some vehicle cases) or 60 days (in all other case) outlining their claim for mitigation. In the majority of cases, interested parties agree to defer initiation of judicial or administrative forfeiture proceedings in favor of the administrative process.

8. Upon receipt of petitions for remission, many are referred to the Office of Investigations ("OI"), U.S. Customs Service for investigation and consideration of allegations raised in the petition in accordance with page 119 of the 1979 FP&F Handbook. Upon completion of the investigation by OI, a report of Investigation is prepared setting forth all available evidence with respect to the information requested on the statements and claims made by petitioners, for transmittal to and use by the District Director or his designee in making his decision on the petition.

9. That Customs considers a wide variety of factors in making a decision on whether to mitigate forfeiture. Whether there was sufficient evidence (probable cause) to support the seizure is just the first

step in analyzing a petition. Evidence to support a seizure and hence a forfeiture is present at the time the vehicle or other item is seized, otherwise the seizure would not have been made in the first instance or it would be cancelled. Once it is determined that there is probable cause for the seizure, other factors which would not be relevant in a judicial forfeiture action must be considered under our mitigation guidelines in reaching a decision on whether any relief should be granted, and if so how much. Some of the factors considered are:

a. Whether the violation occurred in connection with a commercial shipment rather than an importation for personal use. If it is found to be a commercial shipment, mitigation generally would be less.

b. Whether the petitioner has a previous record with Customs as a violator, and if so the nature of the previous violations are.

c. Whether the violation occurred as a result of negligence in failing to declare merchandise or whether the violation was willful.

d. If there are competing claims to the property, which claim has priority or what is an appropriate division of the claims.

e. Whether the owner of the property e.g. bank or lien-holder was innocent of any wrongdoing in connection with the violation which gave rise to the seizure.

f. In the case of currency seizure, the source and intended use of the currency brought into the country illegally is critical to a decision on whether to grant relief from forfeiture.

g. The criminal history of the petitioner as it might relate to any of these considerations.

h. The validity of a claim by an individual that forfeiture would work an extraordinary financial hardship upon him or innocent family members.

10. That evaluating these factors usually takes well over a month. For example, in a currency petition, verification of claims of legitimate source and intended use of the money often requires verification of information outside the United States; a check of petitioner's previous record of violations with Customs could require a search and retrieval of case files which have been placed in storage at a federal records center or in Customs offices across the United States since it is often necessary to obtain copies and read the case file to decide the nature and severity of a previous violation; verifying a claim of a lienholder or owner's claim of innocence or lack of knowledge of the intended illegal use of the seized item can require extensive investigation as can a claim that a shipment is personal when it appears to be commercial in nature. The investigations necessary to verify the various claims by petitioners can require the compilation of witnesses interviews sometimes of persons in other countries, as well as a compilation of a wide range of evidence which may include documents obtained from foreign governments. Such documents often require translation and clarification as to there significance.

11. That the record in *Von Neumann* raises several of the factors previously listed. For example, Von Neumann claimed that his failure to declare the vehicle was inadvertent. While intent to violate the law is not relevant to a forfeiture action (see *Von Neumann* I, 660 F.2d 1319 p. 1323), intentional rather than negligent failure to declare would mean less mitigation. To determine if the violation was

willful, Customs would check its records to determine if Von Neumann had entered the United States at Blaine or other places before thus raising an inference that he is familiar with the port and Customs requirements. In addition, further investigation would be appropriate to determine if Von Neumann imported the vehicle for his personal use or if he intended to sell it. If it were determined that he had intended to sell the vehicle, the amount of mitigation would be about one-half of the amount of personal use importation. I understand that the record in the *Von Neumann* case indicates that the vehicle was not registered in Von Neumann's name. This fact would require investigation to verify his claim that he was the owner of the vehicle. It also raises the possibility that Von Neumann was importing the vehicle for someone else and that there might be other persons subject to Customs penalties or that the importation was commercial.

12. That another factor contributing to delay in the petitioning process is the availability of supplemental petitioning rights (19 C.F.R. 711.33) which allows a violator to file a second petition if he is dissatisfied with the decision reached in the first. Under the regulations, the violator has 60 days from the date of the decision in the first petition to file a second supplemental petition, and he may raise new mitigating factors such as financial hardship which may require further investigation.

13. That finally, in seizures valued at more the $25,000 the decision on the petition must be made by our Headquarters Office of Regulations and Rulings in Washington, D.C. and in seizures valued at $100,000 the final decision must be by the Department of Treasury with recommendation from the

Customs District Director and Headquarters. These levels of review and supplemental petition rights are desgined to insure that petitioner receives a fair and relatively independent review of his petition.

14. That I understand the Court's recent decision in *Von Neumann* to hold *inter alia* that the passage of either 11 days (January 20, 1974 to February 3, 1974—date of seizure of vehicle to the date it was returned to Von Neumann) or 33 days (January 20, 1974 to February 25, 1974—date of decision on the first petition) constitutes a delay by Customs long enough to raise a trialable issue of a due process violation founded in the Fifth Amendment.

15. That because most decisions on petitions (approximately 70 percent) normally take more than 30 days for the reasons discussed above, this holding means that Customs could be faced with litigating the due process issue in Federal Court in many cases which heretofore have been settled through the petitioning process.

16. That at the present time approximately 95 percent of petitions for mitigation or remission in car seizure cases are settled administratively i.e. the forfeiture is remitted upon payment of a mitigated penalty, and the vehicle is returned to the petitioner upon payment of the mitigated amount, without the necessity of instituting either administrative or judicial forfeiture proceedings (depending upon the value of the vehicle seized).

17. That although the parameters of the *Von Neumann* decision are not clearly defined, a broad reading of the decision, if implemented, could mean that Customs will be compelled to deny petitions within 30 days due to inadequate knowledge of the pertinent facts and circumstances rather than run the

risk of losing the case on due process grounds or having to litigate this issue in every case. As a result, perhaps as high as 70 percent of all seizures made by Customs would require referral for either judicial or administrative forfeiture proceedings. Nearly all of these referrals would be cases that under our present system would have been settled by the granting of administrative relief.

18. That briefly stated and in summary, the *Von Neumann* decision if it stands would, in my opinion, have a disruptive effect on the implementation of the Customs FP&F Program described in detail in Attachment I. Many petitioners whose petitions would have been resolved administratively will find themselves tied up in the Federal courts in a more formal and costly proceeding having to retain an attorney and in some cases pay attorney fees and winding up in a much worse position than if Customs could have acted expeditiously on their petition administratively.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Donald W. Lewis
DONALD W. LEWIS
Director, Entry Procedures
and Penalties Division
Office of Regulations and
Rulings U.S. Customs Service

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